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SPECIFIC PERFORMANCE OF CONTRACTS—DEFENCE OF LACK OF MUTUALITY.

Fourth Paper.

BONDS FOR THE CONVEYANCE OF REAL PROPERTY—SUBJECT OF OPTIONS CONCLUDED.

The third paper[1] dealt with the idea of lack of mutuality as a special defence in equity, in connection with the cases in the United States relating to the specific performance of contracts in which the plaintiff held an option. The cases discussed were those in which the option was given for what the court regarded as a good consideration. None of them raised the question of the specific performance of contracts containing an option, where the option was not based on a consideration, but on a sealed instrument. Suppose B. gives A. a bond in a penal sum, conditioned to become void, if A. signifies his desire to purchase B.'s land at a sum named, and B. conveys the land to A. Before A. signifies his desire to purchase as indicated there is a formal contract between

[1] August number, *supra*, page 447.

the parties in which A. has an option to purchase B.'s land. At common law this formal contract is binding. In some jurisdictions the formal contract has been abolished by statute. Where this is true, at least before A., in the case supposed, has signified his desire to purchase, there is no contract between the parties. Where, however, the common law prevails, and the formal contract is still binding at law, the purely equitable question arises, whether specific performance will be given? The difficulty of answering this question lies in the fact that it has hardly ever been discussed. It is true that a bond conditioned to sell real estate in some States usually appears in almost every concluded negotiation for the sale of land. But it must be remembered that the existence of a bond conditioned to sell, by no means necessarily indicates that a formal contract of sale, in which the vendee has an option, is a correct description of all the contractual relations in respect to the land between the parties. Of course the bond may indicate the whole transaction between the parties. B., in the illustration above given, may have handed it to A. as a gift. In this case the only relation between the parties, is the formal contract containing an option. But the bond may coexist, with a contract between the parties, based on a consideration, for the sale of land, or the bond may have been the result of a contract between the obligor in the bond and a third party, in which contract the obligor undertook to convey to, or become trustee of the land for the obligee. The facts of an English eighteenth-century case illustrate the possibility of a bond coexisting with the relation of trustee and *cestui qui trust*. The case is *Parkes* v. *Wilson*.[2] A. and B. were brother and sister. B. had a son and two daughters. A. was possessed of a copyhold estate which he desired to give to his nephew, and to effectuate this proposed to surrender the copyhold to the uses of his will. This not being practicable, because the officers of the court were out of the way, his sister and heir consented to give, and did give, a bond to her son, that she would at any time, upon the payment of £200, and upon the requst of her son, surrender the estate to him. A. died. The son entered, and took the rents during

[2] 10 Mod. 515, 1724.

his life, and died. His mother then entered, received the rents and died, having by will given the land to the defendant, one of her two daughters. The mother had never conveyed the land to her son. The other daughter and plaintiff in the case, as co-heir with the defendant of their brother, brought her bill to have a conveyance of one moiety of the land. Here there was a formal unilateral contract between the mother and son. The son had given no consideration, but under the formal contract he had a right to receive the land on the payment of £200. Between the mother and her brother, however, there was a unilateral contract based on a consideration executed by the brother. This contract made the mother in effect trustee for the son, the obligee in the bond, and it is in this last aspect that the court regards the case.[3]

As stated these bonds may also coexist with a contract based on a consideration between the obligor and obligee. There are indeed several possible contractual relations between the parties. The bond may have been delivered by the obligor for a consideration executed by the obligee. In that event, besides the formal contract containing an option, we have a contract, based on a consideration executed, containing an option.[4]

[3] The court says: ". . . the mother must be considered by this court as trustee for the son." Alison's case, 9 Mod. 62, 1724, is identical with Parkes *v.* Wilson, except that in Alison's case, the son was not obliged to pay money to the mother for the conveyance. The court again treats the mother as trustee. An early and similar case in this country is Telfair *v.* Telfair, Desauss, 271 (So. Car.), 1804.

[4] In these illustrations I have assumed that the bond contains a time option to purchase. Where the bond is merely conditioned to convey land on demand, no possibility of an option exists. A bond conditioned to convey on demand may, of course, have been delivered for a consideration executed. In such a case there is outside of the bond, a unilateral contract based on a consideration for the sale of land. This contract can be enforced in equity, but such action is not an example of the enforcement of optional contracts. The difference between such a case, and an instance of the enforcement of an option, is the difference between the situation of a man who has the right having paid for land to receive it on demand, and one who has the right to receive the land if he pays a sum certain. For examples of the specific enforcement of the obligations to convey land to the plaintiff, where the plaintiff had given a consideration for the conveyance,

Again the bond may have been given, not for a consideration executed, but for a promise on the part of the obligee. Thus B. may agree to give A. his bond conditioned to convey certain land to A., on A.'s payment of a sum certain, provided A. promises to do some act. Such a relation, however, while possible, is by no means probable. What is, however, not only possible, but exceedingly probable, is that the obligor has delivered the bond to the obligee in consideration of the obligee's promise to pay the sum indicated in the bond as the price of the land. In other words, that there exists between the parties a bilateral contract of sale, and the delivery of the bond is merely one step in the formal execution of this bilateral contract. The formal contract in which the vendee apparently has an option, does not in fact exist, because it is lost in the ordinary contract of sale. The buyer, under the circumstances supposed, is as much bound to take the land as the vendor is to sell, though his obligations may not be evidenced in the bond, or be only subject to proof by parole.[5] Thus in several eighteenth-century cases the obligee offering to pay the price for the land indicated in the bond, has secured the land in a court of chancery. These, however, are not instances, as at first they seem, of the specific performance of formal contracts containing an option, but merely of the specific performance of an ordinary contract based on a consideration to convey land. For in England the courts regarded the existence of a bond conditioned to convey land on the payment of a sum certain, in the absence of other evidence,

and where there was also a bond conditioned to convey on demand, see Hopson *v.* Trevor, 1 Str. 533, 1723; Chilliner *v.* Chilliner, 2 Ves. Sr. 528, 1754.

[5] Under the last supposition the Statute of Frauds prevents the obligations of the vendee being enforced. This does not, however, make the contract itself unilateral, or give the vendee in any true sense an option. For a discussion of the subject of the Statute of Frauds and the defence of lack of mutuality, see the next or Fifth Paper.

Examples of cases granting the plaintiff specific performance, where the defendant had executed a bond conditioned to convey on the payment of a sum certain, but the contract enforced was a bilateral contract of sale: see Barnard *v.* Lee, 97 Mass. 92, 1867; Ewins *v.* Gordon, 49 N. H. 444, 1870.

as indicating the existence of a bilateral contract for the sale of the land between the obligor and obligee.[6] This assumption by the English courts was probably justified by the fact that an option to purchase land was then almost unknown, while bonds, as part of the machinery of sales of land seem to have been common. The presumption has been favorably referred to in the United States.[7] It may be doubted, however, whether there is anything in our practice relative to the sale of land to justify the presumption.

As far as is known to the writer there is only one case reported in this country, where a court of equity has been asked to make the defendant convey his land to the plaintiff in accordance with the terms of his bond, though there was no evidence that the bond had been delivered for a consideration, and the defendant, before the plaintiff signified his willingness to take the bond, had repudiated the contract. This case is *Gordon* v. *Darnell*.[8] Specific performance was refused. The court apparently has no thought that the existence of the bond, by itself indicates a bilateral contract of sale between the parties. As contracts under seal are apparently good at law in Colorado, the case fairly brings up the question whether a court of equity will enforce an option in a formal contract. The theory of the court is that in equity the formal contract cannot be enforced. This,

[6] A case reported in Mosely, 37, 1728, is one of the earliest reported instances indicating this attitude. In that case the condition of the bond was to assure certain lands. The court says: "That bonds of this nature were always considered as articles of agreement . . ." Note that the language of the court is not that the bond is an article of agreement, but that it is considered as such. So in Parkes *v.* Wilson, 10 Mod. 515, 1724, a case which, as we have seen, hardly involved the question, see *supra,* it is said: "The authorities are many in this court that bonds have been considered as evidences of agreements and the obligors held to specific performance."

[7] The sentence from Mosely, quoted in the previous note, is used by Powden in his work on contracts, page 314, 1790. From Powden it is taken by Dane; see his abridgment, Vol. VII, page 543, 1824, and by Dane is used by counsel in Ensign *v.* Kellogg, 4 Pick. 1 (Mass.) 1826; see also Ewins *v. Gordon,* 49 N. H. 444, 1870. In both of these cases, however, there was evidence to help out the presumption that the bond had been given for a consideration.

[8] 5 Colo. 302, 1880.

of course, is in accordance with the practice of courts of chancery generally. The Colorado court regarded the bond as a continuing offer, and the repudiation of the bond, before the plaintiff elected to take as a withdrawal of the offer. To reply to this position it may be pointed out that, except in those states which have abolished the formal contract, it is perhaps hardly correct to say that a formal contract does not exist in equity. The defendant attempted to repudiate his formal contract, but he could not have applied to a court of equity to have the bond delivered up for cancellation. There was a contract binding at law between the parties. Equity had nothing to do with the attempted repudiation. When the parties came into chancery the plaintiff by offering to pay the money had performed the condition precedent to the obligation of the defendant to convey, and therefore the contract was no longer a merely formal contract. Yet the position of the Colorado court will probably be followed in other jurisdictions in this country should a similar case arise. There are two reasons for this last statement. In the first place there is, as we shall see in the last part of this paper, a distinct tendency with us to regard nude agreements of sale, containing a supposed option to buy at a sum certain, as continuing offers to sell at the price named, and a merely formal contract is in equity in one sense a nude agreement. In the second place, as long as courts of equity refuse to enforce merely formal contracts, fair reasons may be advanced for refusing to enforce the plaintiff's option to purchase, where the defendant has repudiated the formal contract before the plaintiff has elected to buy. It is true that regarding the contract as in existence at the time the bill is filed, the plaintiff is as much bound to purchase, as the defendant to convey. But the contract, the terms of which the court is asked to enforce, is not a contract entered into when the plaintiff signified his desire to take the land, but the formal contract entered into when the bond was delivered, and formal contracts a court of equity will not enforce.[9]

[9] In Warren *v.* Castello, 19 S. W. 29 (Mo.), 1892, the court also regards a bond without apparent consideration as a continuing offer. The opinion in view of the facts of the case is dicta. In Parker *v.* Perkins, 8 Cush. 318 (Mass.) 1851, and Murphy *v.* Marland, 8 Cush. 575 (Mass.) 1851,

Of course, where there is positive evidence that the bond was given for a consideration, courts of equity have no difficulty in granting specific performance of the obligation to convey the land, either where the plaintiff has a right to conveyance on demand, or where he holds an option to demand a conveyance on the payment of a sum certain.[10] For if the court considers that there is a valid enforceable contract between the parties, they will never regard the penalty in the bond as an alternative covenant and refuse specific performance on that ground. The argument that the penalty gives the obligor an alternative either to pay the money or convey the land, often pressed, has never been adopted.[11]

The discussion of options in formal contracts brings us to the end of the specific performance of contracts containing an option. The subject, however, would perhaps not be complete unless an example of a line of cases, which it is easy to confuse with those which discuss the effect of the defence of lack of mutuality in cases of option, were not given. In every case of the specific performance of contracts the court is called upon to decide whether there is a contract between the parties. When this question, which is necessarily a question of contracts and not of the specific performance of contracts, is decided in the affirmative, then, and not until then, does the question arise whether the defendant's obligation, which is admitted to exist, can be enforced by a court of equity. The question whether the defendant is under any obligation to the plaintiff to perform the act which the plaintiff asks a court of equity to make him

specific performance was given a plaintiff who held such a bond, and who signified his desire to take the land, before the defendant attempted to repudiate the obligation. Nothing is said in either case by the court to indicate whether they regarded the bond as evidence of a bilateral contract of sale between the parties or as a continuing offer.

[10] For examples see Plunkett *v.* The Methodist Soc., 3 Cush. 561, 1849; Johnston *v.* Trippe, 33 F. 530, 1887.

[11] Hopson *v.* Trevor, 1 Str. 533, 1723; Chilliner *v.* Chilliner, 2 Ves. Sr. 528, 1754; Butler *v.* Bartholomew, 12 Price. 797, 1823, p. 822; Gordon *v.* Brown, 4 Tr. Eq. 399 (So. Car.) 1846; Plunkett *v.* The Methodist Soc., 3 Cush. (Mass.) 561, 1849; Dooley *v.* Watson, 1 Gray (Mass.) 414, 1854; Ewins *v.* Gordon, 49 N. H. 444, 1870, p. 457.

perform, and the question whether, admitting the defendant's obligation, the court of equity should give the relief desired, are distinct questions. Unfortunately, however, for the sake of clear thinking, the term mutuality is used, as we have heretofore seen,[12] not only in the sense of mutuality of remedy in equity, and also the special mutuality in obligation required to secure specific performance in equity, but it is likewise used to designate a requisite of a good contract at common law. Thus is a case where the plaintiff claims to have an option and asks specific performance, the court may discuss the question whether there is a contract between the parties, and use the term mutuality in this last sense. It is natural that such a case should be subsequently confused with those which raise the defence of lack of mutuality to the specific performance in equity of contracts containing an option. For instance there are cases decided in chancery which introduce the idea of mutuality to solve the problem in contracts presented by one party to an agreement without consideration having performed a condition precedent to the apparent obligation of the other party. Thus A. and B. enter into an agreement in which B. promises, that if A. performs some act, he, B., will convey A. his land. A. is under no obligation to perform the act, but he does perform it, and B. refusing to convey the land, A. in a court of chancery, seeks to compel him to convey. The defendant may raise the defence of lack of mutuality, and the court discussing the question whether the defendant is or is not bound to convey, deals with the defence. Such a case is *Perkins* v. *Hadsell*.[13] The assignor of the plaintiff, one Stout, and the defendant had entered into a written agreement that Stout was to have the privilege of selecting from the lands of the defendant an eighty-acre lot. If Stout made the selection within six months and went on to improve the land selected, he was to have the right to demand a deed before he had paid in full the purchase price. Stout made a selection and began to improve the lot within the time mentioned in the agreement. He assigned his interest to a third

[12] First Paper, May number, *supra*, p. 270.
[13] 50 Ill. 216, 1869.

party, who assigned to the plaintiff. The plaintiff offered to pay the price for the land, and demanded a conveyance which was refused. He then brought his bill for specific performance. The defendant raised the objection of lack of mutuality. Dealing with this question the court says:

"If the owner of a piece of land executes a written instrument by which he promises to convey the land to another if the latter will erect a house worth five thousand dollars upon it within one year, and pay the owner a certain price for the land within two years, and such person erects the house within the appointed time, without dissent by the owner, and then tenders the stipulated price and demands a deed, a court of chancery would not hesitate to decree a conveyance on the ground of want of mutuality or of consideration. The mutuality and the consideration consist in having actually done, upon the promise of the other party, what he required to have done, and it is immaterial that it was done without a previous undertaking to do it."

It will be noted that the case given in the illustration used by the court is one in which it is probable that the defendant after he erected the house had an option for two years to purchase for a certain price.[14] This option the court declares that it is proper to enforce, but the mutuality and consideration refer, not to any possible defence to the specific performance of optional contracts, but to the erection of the house as an act stipulated for by the defendant, which, performed by the plaintiff, though he was not bound to perform it, created a binding contract between the parties.[15]

[14] This was also probably true of the case before them, that is after making the improvements the plaintiff had the right, but was not under any obligation to take the land.

[15] The idea that the performance of the act, stipulated for by the defendant, supplies mutuality to the contract is likewise introduced in several equity cases, where the act, as in Perkins *v.* Hadsell was detrimental to the plaintiff. In these other cases, however, the performance of the act stipulated for by the defendant, created an ordinary contract of sale and not an option: Wynn *v.* Garland, 19 Ark. 23, 1857; Scott *v.* Shiner, 27 N. J. Eq. 185, 1876; Frue *v.* Houghton, 6 Colo. 318, 1882; The Wisconsin, Iowa & Nebraska Ry. Co. *v.* Braham, 71 Ia. 484, 1887; Bigler *v.* Baker, 58 N. W. 1026 (Neb.) 1894, p. 1028.

An example in which the resulting contract contained an option, but

It may be, since this is a case in equity, that the defence of lack of mutuality (which is brushed aside in the paragraph cited above) had been urged in the hope of impressing the court with the idea that whether or not there was a sufficient mutuality of obligation to create a good contract at law, there was not sufficient to make a contract which equity would specifically enforce. If this is so, while the argument had nothing to do with contracts containing an option, it is an instance of the survival of the old eighteenth century idea that, to have specific performance there must be a special mutuality in obligation not required at law. Whatever was intended by counsel for the defence, the court regarded the argument of lack of mutuality as only another way of stating the absence of a consideration in the original agreement,[16] in other words as denoting the fact that there was no contract either at law or in equity.

Where the act stipulated for by the defendant is not detrimental to the plaintiff, his performance creates a contract, but in these cases, as no reference is made to the subject of mutuality they are not apt to be cited in cases dealing with that defence in equity. For instance, B. agrees to give A. a definite time to make up his, A.'s, mind whether he desires to take B.'s land at a certain price. Within the time designated A. signifies his desire to buy.[17] On the theory of *Perkins* v. *Hadsell* that the defendant is bound because the plaintiff performed an act which was detrimental to him, there is no ground for holding that there is a

in which the discussion of the defence of mutuality is in relation to the specific performance of the option, no reference being made to the fact that the original contract was at least not more than a formal contract on a nominal consideration, is Stanton *v.* Singleton, 54 P. 587 (Cal.) 1898.

Perkins *v.* Hadsell has been used as throwing light on mutuality as a defence in cases where the plaintiff has an option, as follows: Estes *v.* Furlong, 59 Ill. 298, 1871; page 302; Schroeder *v.* Germeinder, 10 Nev. 355, 1875, page 336; Guyer *v.* Warren 175 Ill. 328, 1898, page 335.

[16] Page 218.

[17] In this illustration there is no option. If A. had until a time certain to pay a definite sum for an option, the question of contracts raised by his willingness to pay the sum within the time designated, would not be different than that given in the illustration.

contract between the parties.[18] But in these cases the courts usually turn to the other, and more generally adopted theory, that the original nude agreement, which apparently gives a refusal to one party until a particular time, constitutes a continuing offer on the part of the vendor, which, if not withdrawn, being accepted by the other party within the time stipulated, creates a binding contract.[19]

The idea that a nude agreement to convey if the vendor signifies his desire to buy before a designated time, is a continuing offer, has, as we have heretofore pointed out,[20] been introduced into contracts for a good consideration, containing an option. The option is looked upon as a

[18] This apparently is the reason for the decision in Davis *v.* Petty, 48 S. W. 944 (Mo.) 1898.

[19] The principal case in equity holding this view is perhaps that of the Boston and Maine Railroad Company *v.* Bartlett, 3 Cush. 224 (Mass.) 1849. In that case the defendants had agreed, in consideration that the corporation plaintiffs would take into consideration the expediency of buying land for their use as a corporation, to convey to the plaintiffs, "the said lot of land for the sum of twenty thousand dollars, if the said corporation would take the same within thirty days from date." Within the time specified the corporation indicated its desire to take the land at the price named. The defendant refused to convey and a bill for specific performance was brought. The court granted the relief prayed for on the theory that the agreement above recited, while not a contract, because without consideration, was a continuing offer which had not been withdrawn before acceptance. Under the theory the contract which the court enforced was that which was entered into when the plaintiff signified its willingness to take the land. The corporation is considered to have at that moment accepted the defendant's continuing offer. See also Potts *v.* Whitehead, 20 N. J. Eq. 55, 1869, pp. 57, 58. Where the facts warrant it, the idea of the nude agreement being a continuing offer, and the detrimental character to the plaintiff of the act which he has performed, is more or less confused in the same opinion. See Perkins *v.* Hadsell, *supra,* and Wilks *v.* Georgia Pacific R. R. Co., 79 Ala. 180, 1885, pp. 185, 186. In this last case, though the court speak of the original agreement as an offer, they treat the ability of the defendant to have withdrawn it, before the plaintiff performed the act stipulated for as an open question. See for a similar doubt Wisconsin, Iowa & Nebraska R. R. Co. *v.* Braham, 71 Ia. 484, 1887. Unless a consideration can be found in the original agreement giving the prospective purchaser time to consider whether he will take, the right of the owner of the land to end all negotiations would seem to be beyond question. See Gordon *v.* Darnell, 5 Colo. 302, 1880.

[20] Third Paper, *supra,* page 456.

continuing offer. This, of course, is an unnecessary supposition. An option in a contract, based on a consideration, cannot be withdrawn. Such an option, therefore, is not treated as if it were an offer. To call it an offer is to introduce a fiction, and then refuse to carry the fiction to its legitimate conclusion.[21]

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[21] See Willard *v.* Tayloe, 8 Wall. 310, 1869, citing Railroad Co. *v.* Bartlett, *supra;* Ensign *v.* Kellogg, 4 Pick. 1 (Mass.), 1851; Warren *v.* Castello, 19 S. W. 29 (Mo.) 1892 for examples of this method of treating options.